(5)

No. 03-1570

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ANGEL L. MATEO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

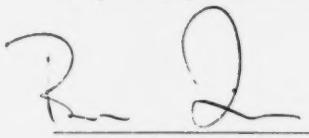
The Petitioner, ANGEL L. MATEO, who is now held in the Clinton County Correctional Facility in Dannemora, New York, asks leave to proceed on his Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and *in forma pauperis* pursuant to Rule 39 of the Rules of this Court.

Mr. Mateo's affidavit in support of this motion is attached. He was granted leave to proceed *in forma pauperis* in the courts of New York in the proceedings below. Moreover, this Court granted him leave to proceed *in forma pauperis* as respondent opposing a petition for writ of certiorari in a related case. See Hynes v. Tomei, 527 U.S. 1015 (1999).

Office of the Clerk
MAY 26 2004
FILED
Supreme Court, U.S.

This the 24th day of May, 2004.

Respectfully submitted,



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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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PEOPLE OF THE STATE OF NEW YORK,)
)
Petitioner,)
)
v.)
)
ANGEL L. MATEO,)
)
Respondent.)

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ANGEL L. MATEO, am the petitioner in the above-entitled case. In support of my motion for leave to proceed *in forma pauperis*, I state that because of my poverty, I am unable to pay the costs of this proceeding or to give security therefor; and I believe I am entitled to redress.

I further state that the statements below are true.

1. I am presently incarcerated in Clinton Correctional Facility in Dannemora, New York. I have been so incarcerated since January 1999. Prior to that, I was incarcerated in the Monroe County Jail from November 1996.

2. I am not presently employed nor have I been employed since I was incarcerated in November 1996. My spouse, Monica Szlekovics, is presently incarcerated and has been since 1996. My wife and I are estranged and I have filed for a divorce from my wife.

3. I have not received within the past twelve months — nor do I expect to receive in the next month — any income from any business, profession, employment or self-employment, real property, interest, dividends, child support, retirement, unemployment payments, public assistance, disability, or other sources.

4. The sum total of any cash or savings in my jail commissary account is $ 30.00.

5. I currently own no real estate, stocks, bonds, notes, automobiles, or other valuable property or assets.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 21, 2004.

Angel Mateo

ANGEL L. MATEO

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STATE OF NEW YORK,

Petitioner,

v.

ANGEL L. MATEO,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Statement of the Case

In 1995, New York enacted a new death penalty statute. For a defendant convicted of first-degree murder at trial, the statute provided a maximum penalty of death where the district attorney had filed a notice of intent to seek the death penalty. See N.Y. Crim. Proc. Law §§ 250.40, 400.27. But, for a death-noticed defendant who pled guilty to first-degree murder, life imprisonment without parole was the maximum sentence. See N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a). Thus, New York's law, as enacted, reserved the death penalty for capital defendants who exercised their right to trial.

In December 1996, the Monroe County District Attorney, on behalf of Petitioner, the People of the State of New York, obtained an indictment against Respondent Angel Mateo for first-degree murder and other crimes in the County Court of Monroe County, New York. In January 1997, the District Attorney filed a notice of intent to seek the death penalty. Before his trial, Mr. Mateo challenged the capital statute as unconstitutional under this Court's ruling in United States v. Jackson, 390 U.S. 570 (1968). In Jackson, the Court had invalidated the death-penalty provision of the Federal Kidnapping Act because it allowed a death sentence for defendants who went to trial while setting a maximum penalty of life imprisonment for those who pled guilty. That statutory scheme, the Court had held, unduly and "needlessly" burdened the Sixth Amendment right to a jury trial and the Fifth Amendment privilege against self-incrimination. Id. at 582.

The trial court in Mr. Mateo's case, while agreeing that New York's statute was unconstitutional under Jackson, declined to invalidate it entirely. Instead, the trial court simply struck the plea provisions, thus barring any guilty plea to first-degree murder while a death notice

remained pending. People v. Mateo, Ind. No. 914/96, slip op. at 57 (County Ct. Monroe County Aug. 27, 1997).

The District Attorney challenged that decision in the Appellate Division of the State Supreme Court, by initiating a collateral action seeking a writ of prohibition or, alternatively, a declaratory judgment. The trial judge, the Honorable John Connell, and Mr. Mateo were respondents in that action. In June 1998, the Appellate Division declared the plea provisions constitutional. Matter of Relin v. Connell, 251 A.D.2d 1041, 1042, 674 N.Y.S.2d 192, 193 (4th Dept. 1998) (A. 106).[1] Mr. Mateo appealed that ruling to the New York Court of Appeals. That court consolidated his case with another presenting the identical issue, Matter of Hynes v. Tomei, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dept. 1997).

In September 1998, Mr. Mateo's criminal trial began. A jury convicted him of first-degree murder and other crimes. On December 16, 1998, after a separate sentencing proceeding, the jury returned a death verdict.

Six days later, the Court of Appeals ruled on Mr. Mateo's appeal in the declaratory judgment action. In a consolidated opinion, it reversed the Appellate Division decisions in Relin and Hynes. Matter of Hynes v. Tomei, 92 N.Y.2d 613, 706 N.E.2d 1201, 684 N.Y.S.2d 177 (1998) (A. 90). The Court of Appeals rejected the District Attorney's claims that Jackson was no longer good law and that the New York statute was somehow distinguishable from the one in Jackson. Hynes, 92 N.Y.2d at 621-27, 629 (A. 92-101, 104). But the court did not cure the defect by striking the death penalty from the statute as this Court had in Jackson. Instead, the Court of Appeals, confirming the decision of the trial court, excised the offending plea provisions, thus barring all pleas to first-degree murder

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[1] "A. ___" refers to Petitioner's Appendix, filed with the petition.

where a death notice is pending, i.e., where death is an available sentence. Hynes, 92 N.Y.2d at 627-30 (A. 101-104). This is a remedy that this Court recognized would cure a Jackson problem. Jackson, 390 U.S. at 584. The Court of Appeals thus brought New York into compliance with Jackson, joining every other death-penalty jurisdiction.

The District Attorney, together with his counterpart in the companion case, sought a writ of certiorari from this Court to review the Court of Appeals' decision in Hynes. They argued that the decision in Jackson should be reversed or modified, or alternatively, that New York's statute comported with Jackson. This Court denied the petition. Hynes v. Tomei, 527 U.S. 1015 (1999).

Thereafter, in the direct appeal of his criminal case to the Court of Appeals, Mr. Mateo challenged his death sentence because he was tried while the unconstitutional plea provisions were in effect. The Court of Appeals agreed; it vacated his death sentence and directed the trial court to resentence him to a sentence less than death. People v. Mateo, ___ N.Y.2d ___, 2004 WL 330090 (Feb 24, 2004) (A. 11).

That decision did not address the viability of Jackson or its application to New York's capital statute. The Court of Appeals had already resolved those issues in the declaratory judgment action, and neither the District Attorney (SA. 1-7)[2] nor the Attorney General (SA. 8-16) asked the court to consider them again in the direct appeal. Instead, the District Attorney's and Attorney General's briefs (SA. 1-16) and the court's decision, Mateo, ___ N.Y.2d at ___ (A. 8-11), focused on the purely state-law question of whether the Appellate Division's ruling in the declaratory judgment action holding the plea provisions constitutional had been binding at the time in Mr. Mateo's criminal case; if it had been, then the provisions were in effect when Mr. Mateo was tried. Indeed,

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[2] " SA. __" refers to Respondent's Supplemental Appendix attached to this brief.

as the Court of Appeals noted in its decision, "The People and the Attorney General concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated." Mateo, ___ N.Y.2d at ___ (A. 8). The court held that, under New York procedural law governing declaratory judgments, the Appellate Division's ruling had been binding in the criminal case; accordingly, it vacated Mr. Mateo's death sentence. Id.

Reasons Why the Petition Should Be Denied

Petitioner comes before this Court having failed to properly preserve the argument that it should overrule the decision in United States v. Jackson. Petitioner never raised that claim in Mr. Mateo's direct appeal. Moreover, had the claim been raised, the New York Court of Appeals would have rejected it on state grounds: it would have been barred under New York's *res judicata* rule, since it had been fully litigated by Mr. Mateo and the District Attorney and finally decided by the Court of Appeals in the separate declaratory judgment action. Thus, this Court lacks jurisdiction to consider this case.

Even if this Court had jurisdiction, there would be no reason for it to revisit a 36-year-old decision that has virtually no impact on modern jurisprudence. Overruling Jackson would not impact a single existing statute and would affect the cases of, at most, four defendants in New York.[3] This is simply not an issue worthy of the Court's consideration.

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[3] Other than Mr. Mateo, there are only three death-sentenced defendants with pending appeals who were indicted under the defective statute (i.e., before Hynes): Stephen LaValle, Robert Shulman, and Nicholson McCoy.

Since this Court decided Jackson, only New York has enacted a statute that conflicted with that decision. The Court of Appeals has now brought that statute into compliance with Jackson, a point Petitioner does not dispute. Thus, there is no "important federal question," Sup. Ct. R. 12, for this Court to determine.

Finally no decision of this Court conflicts with or undermines Jackson. Petitioner suggests that Jackson is inconsistent with this Court's subsequent decisions on plea bargaining. In fact, there are no such inconsistencies and those cases cite approvingly to Jackson.

A. This Court lacks jurisdiction: The federal issues were neither raised nor decided in Mr. Mateo's direct appeal and, under state procedural law, could not have been considered because they had previously been decided by a final judgement in a separate civil action between the parties.

The federal issues the petition presents were fully litigated by the District Attorney and Mr. Mateo and finally decided by the Court of Appeals in the declaratory-judgment action. (That was a final judgment, which the District Attorney unsuccessfully petitioned this Court to review.) Thus, under the state doctrine of *res judicata*, these issues could not be considered again in Mr. Mateo's direct appeal. And, in fact, Petitioner never raised them and the Court of Appeals never decided them in the direct appeal. Accordingly, this Court lacks jurisdiction.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the rule that it 'will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." Adams v. Robertson, 520 U.S. 83, 86 (1997). See Campbell v. Louisiana, 523 U.S. 392 (1998). Here, Petitioner never raised, and the Court of Appeals never addressed, the federal issues presented in the

petition — whether Jackson should be overruled and, if not, whether New York's capital plea provisions are nevertheless constitutional under Jackson.

In Mr. Mateo's direct appeal to the Court of Appeals, Petitioner assumed that United States v. Jackson was good law, that Hynes v. Tomei was correctly decided, and that the capital-plea statute invalidated in Hynes was unconstitutional. Thus, Petitioner never challenged Jackson or Hynes in the appeal that produced "the decision" this Court is now "asked to review." Adams, 520 U.S. at 86. Instead, Petitioner's brief claimed *only* that the trial court's order striking the plea provisions, not the subsequent declaratory judgment by the Appellate Division validating them, was binding in Mr. Mateo's criminal case. Accordingly, Petitioner argued, Mr. Mateo was not actually subject to the unconstitutional plea provisions when he was tried. (SA. 2-7). The New York Attorney General took this same approach to the Jackson issue in his intervenor brief. (SA. 9-16).

Thus, the only contested issue that the Court of Appeals addressed and resolved was whether the declaratory judgment was binding and the plea provisions were therefore in effect in Mr. Mateo's criminal case. Mateo, ___ N.Y.2d at ___ (A. 7-11). Indeed, early in its discussion, the court observed: "The People and the Attorney General concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated." Id. at ___ (A. 8). Of course, whether the declaratory judgment was binding was a purely state-law question, and the court treated it as such. Id. at ___ (A. 7-11). Accordingly, it never reexamined the holding of Hynes, the constitutionality of the plea statute, or the viability of Jackson. Hynes, ___ N.Y.2d ___ (A. 7-11).

It is not sufficient that Petitioner opposed, and the Court of Appeals decided, Mr. Mateo's ultimate entitlement to relief under Jackson and Hynes. This Court will not consider overturning a previously-established constitutional holding if the petitioner never challenged the holding below,

but rather simply argued that it did not apply to the case at hand. Thus, in Illinois v. Gates, 462 U.S. 213, 220-21 (1983), the Court declined to address whether there was a good-faith exception to the exclusionary rule, explaining that, while Illinois had challenged the criminal defendant's Fourth Amendment claim in the lower court, it had never specifically urged that the exclusionary rule be modified, and thus the lower court had never considered that question.

The Gates decision cited Morrison v. Watson, 154 U.S. 111 (1894). There, as in Mr. Mateo's case, "the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court," about the constitutionality of a state statute. Gates, 462 U.S. at 222 (citing Morrison, 154 U.S. at 115). See Mateo, ___ N.Y.2d at ___ (A. 7-8) ("In Hynes, we struck the plea provisions as unconstitutional . . . . We break no new ground by applying" Hynes and "striking defendant's sentence of death."). "Nonetheless," in Morrison, this Court "held that there was no showing that 'there was any real contest at any stage of this case upon the point,' and that without such a contest, the routine restatement and application of settled law by an appellate court did not satisfy the 'not pressed or passed upon below' rule." Gates, 462 U.S. at 222 (quoting Morrison, 154 U.S. at 115).

Among the "practical reasons" for insisting that a petitioner present a federal issue to the state appellate court before seeking review in this Court is that it "insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon . . ." Webb v. Webb, 451 U.S. 493, 500 (1981). And indeed, such a state ground existed in Mr. Mateo's case, so that, even had Petitioner tried to challenge Jackson and Hynes in Mr. Mateo's direct

appeal from his death sentence, the Court of Appeals could and would have refused to consider such a challenge — based on the state's well-established doctrine of *res judicata*.[4]

Just over three years before the Court of Appeals decided Mr. Mateo's direct appeal, it decided his appeal in the declaratory judgment action, Matter of Relin v. Connell, together with the companion case, Hynes. In Relin, the District Attorney prosecuting Mr. Mateo, his trial judge, and Mr. Mateo were all parties. See Hynes, 92 N.Y.2d at 618-19. The Court of Appeals ruled that Jackson remained good law and the capital plea provisions were unconstitutional under Jackson. Hynes, 92 N.Y.2d at 625-30. The District Attorney and his counterpart in Hynes filed a petition to review that ruling, presenting essentially the same arguments for overruling Jackson that Petitioner now offers. This Court denied that petition. Hynes, 527 U.S. 1015.

The declaratory-judgment action in Relin was a separate proceeding from Mr. Mateo's criminal case and the Court of Appeals decision in that action was a final judgment — not an "interlocutory ruling" in the criminal case, as Petitioner now asserts. See Pet. at 6, 17. Indeed, there was jurisdiction for the District Attorney and his counterpart to seek certiorari review of the Court of Appeals decision in Hynes only *because* it was a final judgment in a separate proceeding.[5] See Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 553-55 (1947); People ex rel. Bryant v. Zimmerman, 278 U.S. 63, 70 (1928). See also Ohio ex rel. Eaton v. Price, 364 U.S. 263,

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[4] If the party against whom *res judicata* is applied had an adequate opportunity to participate in the prior proceeding, see Richards v. Jefferson County, 517 U.S. 793, 797 (1996), it is an adequate state ground. See Durley v. Mayo, 351 U.S. 277, 280-85 (1956).

[5] Accordingly, Mr. Mateo's brief in opposition argued that the issue was not worthy of review, but did not challenge the Court's jurisdiction. See Respondents' Brief in Opposition to Petition for Writ of Certiorari in Hynes v. Tomei and Relin v. Connell, No. 98-1533 (April 21, 1999).

267 n.3 (1960) (Opinion of Brennan, Black & Douglas JJ., & Warren, C.J.). See generally Robert L. Stern, et al., Supreme Court Practice, at 159, 161 (8th ed. 2002).

Under New York law, *res judicata* bars a criminal appellate court from revisiting an issue previously decided by final judgment in a collateral proceeding. See People v. DiRaffalele, 55 N.Y.2d 234, 243, 433 N.E.2d 513, 517, 448 N.Y.S.2d 448, 452 (1982) (refusing to consider, on direct appeal, double jeopardy issue that it had already rejected in pretrial prohibition proceeding involving defendant and prosecutor). Thus, even had Petitioner raised the federal issues below in Mr. Mateo's direct appeal, the Court of Appeals would have rejected them based on an adequate state ground, namely the *res judicata* effect of its consolidated decision in Hynes.[6]

B. Given the minimal impact of the decision below and 36 years of national conformity with Jackson, there is no "important federal question" at issue here.

This case presents no "important federal question" for the simple reason that, even were this Court to grant the petition and rule in favor of Petitioner, the result would affect, at most, four defendants in New York who were indicted under the unconstitutional statute, and not a single other case or statute there, or anywhere else in the country.

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[6] In fact, the District Attorney himself has acknowledged this: In asking this Court to stay the Court of Appeals' mandate in Hynes pending their previous petition for certiorari, he and the District Attorney in the companion case stated that the judgment in Hynes was a final one subject to Supreme Court review, and explained that because "the constitutionality of New York's capital guilty plea provisions" had already been litigated in Hynes, it "could not and would not" be an issue in Mr. Mateo's appeal from his death sentence or the criminal proceeding in the companion case. Joint Application to Stay Mandate, filed by Monroe and Kings County District Attorneys, Matter of Hynes v. Tomei and Matter of Relin v. Connell, at 27 n.9 (February 19, 1999) (SA.19).

Petitioner does not deny that every capital jurisdiction in the United States complies with Jackson. Instead, Petitioner suggests that the system most other states have settled on is really no different than the ones struck down by this Court in Jackson and the Court of Appeals in Hynes. Petitioner admits that most capital punishment states allow defendants to plead guilty and then conduct a penalty proceeding. Pet. at 13. But Petitioner asserts that in these states the possibility of death is an illusion because defendants rarely if ever receive death after a negotiated plea. Thus, Petitioner concludes that in these states, as under the statutes invalidated in Jackson and Hynes, there are only two alternatives, a trial where death is a possible sentence and a plea where it is not.

This ignores the statutory third option in those states: an open plea that leaves death as a possible sentence. It is the possibility of such pleas that differentiates these statutory regimes from ones invalid under Jackson. Nor is this third option illusory since it is not unusual for defendants in those states to plead guilty to the crime, without a negotiated agreement, and proceed to a sentencing hearing.[7]

Similarly misplaced is Petitioner's suggestion that Jackson and Hynes have somehow interfered with the administration of justice in New York. In fact, they have posed no obstacle to plea bargaining in capital cases. Numerous defendants facing the death penalty have pled guilty to

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[7] Indeed, many such guilty pleas have resulted in death sentences. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); United States v. Sampson, 300 F.Supp.2d 275 (D. Mass.2004); Davis v. State, 740 A.2d 1115 (Ala. Crim. App. 1998); People v. Livaditis, 831 P.2d 297, 9 Cal.Rptr.2d 72, 2 Cal.4th 759 (1992); People v. White, 870 P.2d 424 (Colo. 1994); Morrison v. State, 276 Ga. 829, 583 S.E.2d 873 (2003); State v. Dunlap, 873 P.2d 784 (Idaho 1993); People v. Burton, 184 Ill. 2d 1, 703 N.E.2d 49 (1998); Johnson v. Commonwealth, 103 S.W.3d 687 (Ky .2003); State v. Louiviere, 833 So. 2d 885 (La. 2002); State v. Smith, 705 P.2d 1087 (Mont. 1985); State v. Nelson, 714 A.2d 281, 155 N.J. 87 (1998); State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (2000); Marshall v. State, 963 P.2d 1 (Okla. Crim. App. 1998); State v. Conyers, 487 S.E.2d 181, 326 S.C. 263 (1997); State v. Henderson, 24 S.W.3d 307 (Tenn. 2000); Matchett v State, 941 S.W. 2d 922 (Tex.Crim.App. 1996); Lewis v. Commonwealth, 267 Va. 302, 593 S.E.2d 220 (2004).

first-degree murder in return for the prosecution withdrawing the death notice just before they entered the plea, thus complying with Hynes, 92 N.Y.2d at 629 (A. 103).[8] The Court of Appeals rejected a challenge to the legality of such a plea in People v. Edwards, 754 N.E.2d 169, 754 N.E.2d 169, 729 N.Y.S.2d 410 (2001). Moreover, other death-noticed defendants have pled guilty to second-degree murder, which is also permitted by the Court of Appeals' decision in Hynes, 92 N.Y.2d at 629-30 (A. 104).[9]

Not only has Hynes had no detrimental prospective impact on capital litigation in New York; Petitioner fails to note that it also has little retrospective effect. Because Hynes cured the Jackson defect very early in the life of New York's statute, it can affect the death sentences of only Mr. Mateo and three other condemned prisoners in New York. Every other capital defendant in the state

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[8] See, e.g., People v. Steven Smelefsky, 182 Misc.2d 11, 659 N.Y.S.2d 689 (Sup. Ct. Queens County 1999). See also People v. Schroedel, 182 Misc.2d 154, 158, 697 N.Y.S.2d 904, 907 (County Ct. Sullivan County 1999) (holding that plea permissible if death notice withdrawn). Since Hynes was decided, eight defendants against whom death notices had been filed have pled guilty to first degree murder. (William Banker, Sullivan County, Ind. No. 80-98; Kendall Francois, Dutchess County, Ind. No. 0122-98; Tracey Irwin, Sullivan County, Ind. No. 80-98; Jeffrey Nabinger, Broome County, Ind. No. 02-501; Anthony Schroedel, Sullivan County, Ind. No. 115-99; Steven Smelefsky, Queens County, Ind. No. 2262-98; David Sweat, Broome County, Ind. No. 02-501; and David Van Dyne, Monroe County, Ind No. 97-0736.) Another thirteen have pled guilty to first degree murder while the district attorney was deciding whether to file a death notice. (Angel Carrasquillo, Onondaga County, Ind. No. 2000-0637-1; Alexis Casillas, Suffolk County, Ind. No. 3148-03; Albert Clarke, Kings County, Ind. No. 07717-03; Desmond Fair, Queens County, 1782-99; Darrell Gunn, Onondaga County, Ind. No. 2003-0242-1; Brandon Hall, Monroe County, Ind. No. 98-0720; Kenneth Harris, New York County, Ind. No. 02114-02; Anthony Medina, Erie County, 0116-99; Michael Mikucki, Queens County, Ind. No. 1290-99; Kelvin Owes, Monroe County, Ind. No, 2000-0161; Larme Price, Kings County, Ind. No. 1915/2003; Moo Shin, Queens County, Ind. No. 1407-03; and Frank Thon, Rockland County, Ind. No. 29-03.)

[9] Since Hynes, four such pleas have been entered. (Daniel Best, Rensselaer County, Ind. No. B-10725; Michael Hale, Kings County, Ind. No. 8776-96; Provard Jones, Jefferson County, Ind. No. 166-98; Demeris Tolbert, Kings County, Ind. No. 11616-98.)

has been and will be indicted after Hynes and thus under a statute that does not violate the decision in Jackson. Thus, the effect of Hynes and Jackson remains insignificant.

This also undermines Petitioner's claim that this Court should ignore its prior denial of a writ of certiorari presenting essentially the same arguments made here because at that point "it was still uncertain whether that decision would affect this case or any other." Pet. at 17. Now we know for certain that it will affect very few cases. Thus, the merits of the petition are even weaker than when this Court first rejected it.

C. There is no reason to consider overruling Jackson because no subsequent decision of this Court conflicts with or undermines it.

Petitioner makes several attempts to argue that subsequent decisions of the Court either are inconsistent with or undermine its decision in Jackson. These efforts are unavailing.[10]

Petitioner asserts that four decisions of this Court subsequent to Jackson, upholding the constitutionality of plea bargaining in various contexts, call into question Jackson's viability. In fact, those cases all cite *approvingly* to Jackson. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978);

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[10] Petitioner also attempts to distinguish the New York statute from the one at issue in Jackson. Petitioner argues that the New York statute is saved because it requires "consent of the prosecutor and permission of the court" before a plea can be entered, while the statute in Jackson did not. Pet. at 12-13. This is factually incorrect. As the Court of Appeals noted in Hynes in response to the same argument, "The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the Jackson analysis. Defendants prosecuted under the Federal Kidnaping Act could not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas." Hynes, 92 N.Y.2d at 623 (citing Jackson, 390 U.S. at 583) (A.95). Petitioner also fails to mention that the Supreme Court found North Carolina's capital-pleading scheme unconstitutional under Jackson. See Roseboro v. North Carolina, 403 U.S. 948 (1971). That scheme required the approval of both the trial judge and prosecutor for a defendant to plead guilty and avoid a death sentence. See Parker v. North Carolina, 397 U.S. 790, 792 n.2 (1970).

Corbitt v. New Jersey, 439 U.S. 212, 291 n.9 (1978); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Brady v. United States, 397 U.S. 742, 746-47 (1970).[11]

That approval should come as no surprise. The distinction between plea bargaining and the situation presented in Jackson is clear. In plea bargaining, a statute defines the maximum punishment for all defendants, whether they plead guilty or go to trial. The prosecution may agree to a sentence less than the maximum in exchange for a plea. The problem with the statute invalidated in Jackson, and the offending New York provision, was that, by *statute*, the maximum sentence of those who exercised their constitutional right to trial was higher than the maximum sentence of those who pled guilty, with death reserved for defendants convicted at trial. See Hynes, 92 N.Y.2d at 625 (citing Corbitt, 439 U.S. at 217-19) (A. 98).

Finally, and perhaps most telling, although 36 years have passed since Jackson, Petitioner is unable to cite a single word in *any* subsequent decision of this Court calling the holding of that case into question. Indeed, this Court has cited affirmatively to Jackson as recently as five years ago. See Saenz v. Roe, 526 U.S. 489, 499 n.11 (1999).

In light of all this, it is no wonder that Petitioner makes no reference to this Court's *stare decisis* jurisprudence. *Stare decisis* yields only where subsequent decisions of the Court have eroded a prior decision's underpinnings, see United States v. Gaudin, 515 U.S. 506, 521 (1995), or where

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[11] Petitioner also asserts that, by citing Jackson in a footnote to their opinion in Gregg v. Georgia, three judges of this Court suggested that the advent of bifurcated capital trials rendered Jackson obsolete. Pet. at 12 (citing Gregg v. Georgia, 428 U.S. 153, 192, n. 41 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). On the contrary, that footnote simply compared the way a unitary trial system unfairly discouraged capital defendants from presenting mitigating sentencing evidence by allowing its use to convict them, with the scheme it invalidated in Jackson, which similarly "'chill[ed] the assertion of constitutional rights by penalizing those who choose to exercise them . . . ." Id. (quoting Jackson, 390 U.S. at 581).

the prior decision has splintered the Court and has "baffled and divided the lower courts that have considered it." Nichols v. United States, 511 U.S. 738, 743-46 (1994). These considerations are entirely absent here. There is no reason for the Court to revisit Jackson, much less reverse it.

Conclusion

For the foregoing reasons, Mr. Mateo respectfully submits that this Court should deny the Petition for a Writ of Certiorari to the New York Court of Appeals.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt From Monroe County District Attorney's Brief in the New York State Court of Appeals in People v. Mateo.

Pages 126 though 131

POINT FOURTEEN

THE PLEA RESTRICTION IN THIS CASE WAS CONSISTENT WITH HYNES V. TOMEI
(Answering Appellant's Point XIV)

Appellant urges, perhaps most fervidly, that his death sentence must be set aside because he was "tried under statutory provisions that this Court later held unconstitutional in Matter of Hynes v. Tomei," 92 N.Y.2d 613 (1998). The answer is that he received all he was entitled to under that case: a trial unimpeded by those provisions and thus consistent with United States v. Jackson, 390 U.S. 570 (1968). Because the trial court, like this Court, invalidated sections 220.10(5) and 220.30(3)(b)(vii) of the Criminal Procedure Law, he was never "faced with the choice that Jackson declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." Hynes, 92 N.Y.2d at 626.

Appellant overstates Hynes as having held that "the capital statute is unconstitutional." The Court made it clear that it was not required to, and therefore did not, invalidate the death penalty because it was able to craft a narrower remedy, which left the law intact except that "a defendant may not plead guilty to murder in the first degree when a notice of intent to seek the death penalty is pending." This barrier is sufficient to "obviate the Jackson problem [because] excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by Jackson." Id. at 628. Indeed, Jackson invited just such an accommodation. The Government proposed that the Supreme Court exercise its supervisory power to prohibit district courts from accepting pleas under such circumstances, so that "every defendant charged in

federal court with aggravated kidnaping would face a possible death penalty." The Supreme Court declined to do so on the ground that the impetus for such a change "must come from Congress" and the statute could not "be saved by judicial construction." 390 U.S. at 584-85. New York's statute, by contrast, could be and was saved by this Court because the Legislature expressly authorized it to do so by enacting a severability clause and because it was structurally possible to excise those two clauses in a way that the federal kidnaping statute did not permit.

Appellant does not invite the court to revisit Hynes so much as he argues that its saving construction does not, and cannot be, applied to this case because it was already in the pipeline. The "does not" argument is wrong because the same construction was placed on the statute by the trial court in this case and, unlike People v. Harris, 98 N.Y.2d 452 (2002), the Jackson infirmity did not operate. The "cannot" argument is wrong because it confuses a court's power and duty to construe a statute constitutionally with the inability of a legislature to enact a law which has the effect of enhancing the penalty for a crime that has already occurred.

The court below correctly anticipated the decision in Hynes by holding the same plea provisions, plus another clause that this Court viewed as inconsequential, as unconstitutional for the same reason. Like this Court, it refused to find the entire statutory procedure for imposing the death penalty punishment invalid and instead struck so much of the law as was necessary to assure that "there is now no provision for the defendant to enter a plead of guilty in this death-eligible case," which it, too, viewed as one in which a notice of intent to seek the death penalty had been filed and not withdrawn. R. 17365-66. Although that was assuredly not everything

that appellant asked for, it was everything to which he was entitled under Hynes in order to eliminate the "unnecessary and therefore excessive" consequence of risking a possible death sentence for having exercised his Fifth and Sixth Amendment rights. 92 N.Y.2d at 621.

Appellant answers, first, that while that remedy might have been adequate while it was in effect, it did not exist until he sought and obtained it and that between the filing of that notice and the court's decision, he was "subject" to an unconstitutional statute. By waiting until after the notice was filed to seek relief, he argues, he placed himself in the win-win position of being aggrieved by a statute that he succeeded in invalidating. But the question is whether he was "subject" to an incurable constitutional wrong from the beginning or whether, as he elsewhere describes the issue, whether it would have been wrongful to have "tried" him under statutory provisions that this Court later held to be unconstitutional.

The answer is that the wrong would have accrued only at trial because, as the Court explained in People v. Edwards, 96 N.Y.2d 445, 453 (2001), what is unconstitutional under Jackson are not guilty pleas "encouraged by a fear of a possible death sentence," but laws that impose that penalty only on those defendants "ingenuous enough to seek a jury acquittal" while at the same time exempting those who plead guilty to the same charge. What is offensive is not the inducement, the Court reasoned, but the "impermissible burden" that such a "two-tiered penalty structure imposes on a defendant's assertion of his or her constitutional rights." Id. Thus, the "carrot" which the statute offered appellant if he had pleaded guilty did not subject him to a Jackson violation any more than it did Edwards. And, unlike Harris, he did not suffer the

"stick" of capital punishment because he chose to exercise his Fifth and Sixth Amendment rights. Once the court below ruled as it did, he was left with "no choice but to go trial." People v. Parker, 755 N.Y.S.2d 521 (4th Dept. 2003).

But, he argues, the window of opportunity was opened again because the People, in an unsuccessful attempt to reverse that ruling, obtained a declaratory judgment that the statute was constitutional as drafted. Matter of Relin v. Connell, 251 A.D.2d 1041 (4th Dept. 1998), rev'd sub nom. Hynes v. Tomei, supra. Although appellant now insists that the trial court was bound by that judgment to have considered a guilty plea if the parties had agreed to one, he correctly conceded, at page 31 of his brief to this Court, that the collateral proceeding had no effect on this case because the Court has "consistently and unequivocally held that a declaratory judgment regarding a criminal prosecution does not apply in the underlying criminal case." E.g., Matter of Bower & Gardner v. Evans, 60 N.Y.2d 781 (1983); Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 152 (1983); see David Siegel, New York Practice (3d ed. 1999) 709 (declaratory judgment is prospective and thus does not apply to "specific criminal case that triggered the declaratory action").

The trial court did not pass on whether its prior order was still operative, finding the question "kind of moot" inasmuch as "no plea under any circumstances" was in the offing. Whatever the Appellate Division's opinion, as far the prosecution was concerned, there was "no plea offer" and, appellant confirmed, "Ain't nobody taking it." R. 9078, 9123-24. While the defense did make a last minute overture, the prosecution adhered to its position that the case

warranted the death penalty. Accordingly, under the law of the case, as it stood and as ultimately vindicated by Hynes, appellant had "no choice but to go to trial" at the point he did. R. 6022.

Appellant is therefore wrong to read Harris as authority for reversal of any capital case in the judicial system at the time Hynes was decided. Not only did the trial court in Harris fail to hold that Jackson prevented a post-notice plea to first degree murder with life imprisonment, it permitted plea negotiations to reach a stage where, as appellant confirms, the defense accepted the offer and was rebuffed only because Harris would not admit his guilt to the satisfaction of the court and the prosecutor. Thus, he did have a choice as to whether to go to trial or to plead guilty and he faced death only because he exercised his Fifth Amendment right against self-incrimination: precisely the evil that Hynes v. Tomei, like the trial court here, remedied. As the People conceded, if Hynes remained the law, Harris's sentence would have to be vacated, as it was. 98 N.Y.2d at 496. And although we continue to believe that Jackson has not stood the test of time, the Court need do nothing more today than recognize that the trial court, by having excised enough of the statutory language to assure that "that a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending," satisfied the Constitution. Hynes, 92 N.Y.2d at 629.

Finally, appellant argues that Hynes must be applied so as to vitiate the death sentence in any State case in which an indictment was returned before December 22, 1998, because the Supreme Court summarily afforded such retroactive relief in four North Carolina cases that had been tried after that state's legislature repealed its similarly unconstitutional plea provisions.

This argument again ignores the difference between what the Supreme Court did by striking the death penalty and requiring new legislation to validly reinstate it, and what this Court did in excising the offending provisions and otherwise leaving the law intact. As the dissenting opinion in one of the North Carolina cases explains, the Jackson remedy meant that there was no valid death penalty in effect in that State at the time those defendants committed their crimes. To construe the legislative repeal of the offending plea provisions as retroactively validating such a sentence, those judges reasoned, would "provide greater punishment for murder in the first degree than the punishment provided therefor when the crime was committed" and would therefore constitute an unconstitutional ex post facto law. "In our view, if the death penalty provisions * * * were invalid in October, 1968, when the crime was committed, they were invalid as to this defendant in April, 1969, when he was tried, convicted and sentenced." State v. Williams, 174 S.E.2d 503, 510-11 (Bobbit, Ch. J. and Sharp, J., dissenting). By contrast, the operative law enacted by New York in 1995 remains valid. By striking so much of the statute as allowed a plea of guilty to murder in the first degree while a notice of intent to seek the death penalty is pending, this Court did not "inflict a greater punishment than the law annexed to the crime when committed" in violation of the ex post facto clause. Nor, for that matter, is that doctrine even applicable to judicial decisions. Rogers v. Tennessee, 532 U. S. 451, 456 (2001) ("as the text of the Clause makes clear, it is a limitation on the powers of the Legislature").

For the same reasons, it would not be unconstitutional, under either Hynes or the ex post facto clause, to expose appellant to the same penalty in the event of a retrial.

Excerpt From the New York State Attorney General's Brief in the New York State Court of Appeals in People v. Mateo.

Pages 7 though 14

ARGUMENT

POINT I

DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT IMPERMISSIBLY BURDENED BY THE FIRST-DEGREE MURDER GUILTY PLEA PROVISIONS, BECAUSE THE TRIAL COURT STRUCK THOSE PROVISIONS AS UNCONSTITUTIONAL PRIOR TO THE START OF DEFENDANT'S TRIAL (Answering Defendant's Brief, Point XIV).

Defendant was not subjected to the unconstitutional dilemma that this Court identified in Matter of Hynes v. Tomei, 92 N.Y.2d 613 (1998), cert. denied, 527 U.S. 1015 (1999), and that led to the vacatur of the death sentence imposed upon defendant Darrel K. Harris. See People v. Harris, 98 N.Y.2d 452 (2002). To the contrary, before the start of defendant's trial, the trial judge struck as unconstitutional the first-degree murder guilty plea provisions that this Court later declared unconstitutional, and as this Court did in Hynes v. Tomei, construed the resulting statute as precluding a guilty plea while a death penalty notice was pending (R. 17364-17367). Thus, as to this defendant, the statute "at the time of defendant's trial" did not "impermissibly discourage[] defendant's assertion of this Fifth and Sixth Amendment rights," Harris, 98 N.Y.2d at 496, and the unconstitutionality of the plea provisions provides no basis upon which to vacate his death sentence.

In Hynes v. Tomei, 92 N.Y.2d at 620, this Court struck the statutory provisions allowing a defendant to plead guilty to first-degree murder, with the consent of the prosecutor and the approval of the court, on the ground that the statutory scheme was unconstitutional under United States v. Jackson, 390 U.S. 570 (1968), because it "explicitly provide[d] two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial." Id.

According to the Hynes Court, this scheme "impermissibly burdened" a defendant's exercise of constitutional rights, because "only those defendants who exercise the Fifth Amendment right against self-incrimination and the Sixth Amendment right to a jury trial put themselves at risk of death," while, at the same time, a defendant who "abandons his right to contest his guilt before a jury is assured that he cannot be executed." 92 N.Y.2d at 623, 625 (quoting United States v. Jackson, 390 U.S. at 581). Such a procedure could not be sustained, because it offers a reward for waiving a fundamental right, or imposes a penalty for asserting it. Id. at 621.

Critical to its determination was the Hynes Court's conclusion that the stricken guilty plea provisions allowed a defendant to plead guilty while a death notice was pending. Thus, the Jackson dilemma could be corrected by striking only the guilty plea provisions and "interpret[ing] the statute as prohibiting a guilty plea to capital murder while such a death penalty notice was pending," Matter of Francois v. Dolan, 95 N.Y.2d 33, 36 (2000), rather than by striking the death penalty in its entirety. Under the resulting statutory scheme, there is no impermissible burden on a defendant's constitutional rights, because there is only one maximum penalty for first-degree murder -- a death sentence. Hynes v. Tomei, 92 N.Y.2d at 628.

In People v. Harris, 98 N.Y.2d at 495-96, the Court vacated the death sentence imposed upon a defendant who had gone to trial while the unconstitutional scheme was in effect. While defendant contends that his case is "analogous" to Harris's (Defendant's Brief at 323), that is not so. Defendant Harris had likewise moved to strike the unconstitutional guilty plea provisions, and his motion was denied;[4] consequently, he was tried pursuant to a Jackson-violative statute.

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[4]See Court of Appeals Brief for Defendant-Appellant in People v. Darrel K. Harris, Point II, p. 89.

Defendant Mateo, in contrast, had his relief granted; the trial court struck the offending provisions, and he was tried under a statute that conformed with Jackson. Accordingly, as a result of his own successful motion, defendant Mateo was prosecuted under a statutory scheme that did not offer him "a reward for waiving a fundamental constitutional right, or impose a harsher penalty for asserting it." Id. at 495 (quoting Hynes v. Tomei, 92 N.Y.2d at 621). Rather, at the time of trial, Mateo faced only a single maximum sentence -- the death penalty -- and he had no choice but to proceed to trial, because the court had interpreted the statute as forbidding a guilty plea. As a result, there could have been no burden on defendant's Fifth and Sixth Amendment rights, let alone an impermissible one, and he therefore is not entitled to vacatur of his death sentence as a result of the unconstitutional guilty plea provisions.

Defendant makes two principal arguments in support of his claim that, like Harris, he is entitled to vacatur of his death sentence. First, he claims that the fact that Justice Connell had stricken the unconstitutional provisions is irrelevant, because the Fourth Department subsequently declared the provisions constitutional, and that decision "was binding precedent" even though it did not technically constitute a vacatur of Justice Connell's decision (Def. Brf. at 327-28). Second, he claims that, regardless of whether he was subjected to the unconstitutional provisions at the time he went to trial, his death sentence is invalid because he was subject to the unconstitutional provisions at least during the seven months between the filing of the death penalty notice and the trial court's decision finding the provisions unconstitutional. Both of these claims are without merit.

Defendant's argument that the Fourth Department's decision was binding legal precedent that meant that he was subject to the unconstitutional provisions at the time he went to trial

ignores settled law from this Court as to the legal effect of a decision in a declaratory judgment action. In Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 148 (1983), this Court held that a declaratory judgment "cannot be executed upon so as to compel a party to perform an act or to surrender property." Instead, it "only provides a declaration of rights between parties that, it is hoped, will forestall later litigation." Id. As a result, a declaratory judgment action attacking a trial court's interlocutory ruling "*may* be granted when the controversy is over the validity of a statute, . . . and there is no immediate attempt to prevent the criminal court from proceeding on the course which it has charted by its ruling." Id. at 151-52 (emphasis in original). Indeed, in this situation, the appropriate parties to a declaratory judgment action "do not include the individual defendant in the case where the challenged ruling was made," and the action "cannot seek an injunction against the individual defendant or the criminal court." Id. at 152.

Morgenthau v. Erlbaum therefore makes it clear that, as to defendant Mateo, the Fourth Department's June 10, 1998, declaration that the plea provisions were constitutional had no legally binding effect, and that the existence of that declaration -- which was already pending further review in this Court when defendant's trial commenced on September 1, 1998 -- did not place him in the same position as defendant Harris. In other words, the only "binding" precedent in defendant Mateo's case on September 1, 1998, was Justice Connell's August 25, 1997, decision striking the offending provisions as unconstitutional.[5] As a result, defendant is simply

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[5]As he made clear in his Appellate Division brief in response to the District Attorney's declaratory judgment action, Justice Connell did not consider himself bound by any decision rendered in that proceeding (R. 7982 (any declaration "could not be applied to this case, but would only control the outcome of other cases")).

wrong in contending that, like Harris, he was subjected to those unconstitutional provisions at the time he went to trial.

Nor is there any merit to defendant's second claim -- that even if he was not subject to the unconstitutional provisions at the time he went to trial, he is nonetheless entitled to vacatur of his conviction because he was subject to those provisions between the time the death penalty notice was filed and the time the provisions were stricken. As an initial matter, in Harris, this Court focused on the commencement of the trial in determining that the defendant had been placed in a Hynes/Jackson dilemma. People v. Harris, 98 N.Y.2d at 495-96 ("[a]ll seven of us agree that the statute at the time of defendant's trial impermissibly discouraged defendant's assertion of his Fifth and Sixth Amendment rights" (emphasis added)). Thus, unlike the case in Harris, when the unconstitutional provisions were stricken well before the commencement of Mateo's trial, it cannot be said that his constitutional rights were similarly burdened.

Moreover, it makes sense that the date of the trial is the significant event triggering a Hynes/Jackson dilemma, as opposed to some earlier date such as the date of the filing of the death penalty notice. After all, in the context of a Jackson/Hynes dilemma, the constitutional rights that are burdened by the defective provisions -- the Fifth Amendment right against self-incrimination and the Sixth Amendment right to a jury trial, Hynes, 92 N.Y.2d at 620 -- are quintessential trial rights. Logically, these rights are exercised, and therefore impermissibly burdened, only when a defendant either chooses to reject an offer to plead guilty or actually proceeds to trial.[6]

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[6]The Hynes Court also noted that capital defendants "who are awaiting trial and are offered a plea are still faced with the choice Jackson declared unconstitutional: exercise Fifth and (continued...)

Decisions from the Supreme Court also seem to support the conclusion that the relevant triggering date is the date of trial. For instance, in Parker v. North Carolina, 397 U.S. 790, 794-95 (1970), a case dealing with the effect of a Jackson defect on a defendant who had pleaded guilty, the Court noted that "[i]t may be that under United States v. Jackson, 390 U.S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea" (emphasis added). Notably, the Court did not seem concerned with the statute in effect at the time the defendant was charged with the capital crime, but only the moment when the defendant made the actual choice to plead guilty.

Moreover, although defendant places great reliance on the Supreme Court's summary reversals of a number of capital convictions from North Carolina, in which the defendants went to trial after Jackson-defective plea provisions had been repealed, see Atkinson v. North Carolina, 403 U.S. 948 (1971); Hill v. North Carolina, 403 U.S. 948 (1971); Roseboro v. North Carolina, 403 U.S. 948 (1971); Sanders v. North Carolina, 403 U.S. 948 (1971); Williams v. North Carolina, 403 U.S. 948 (1971), that reliance is misplaced for a number of reasons.

First, these summary opinions contain no analysis, and it is not clear whether these reversals were necessary because the defendants were actually charged with a capital crime under a Jackson-defective statute, or merely because they may have committed the crime while the defective statute was in existence. See, e.g., State v. Roseboro, 171 S.E.2d 886 (Sup. Ct. N.C.

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*(...continued)
Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." Id. at 626. Significantly, here, however, defendant Mateo was never offered a plea bargain (Def. Brf. at 327), and as defendant himself concedes, he would not have agreed to plead guilty if such an offer had been made (Def. Brf. at 327; R. 9124; R. 7824-25 (noting, in opposition to declaratory judgment action, that no plea offer had been made or sought)).

1970), rev'd, 403 U.S. 948 (1971) (Jackson-defective guilty plea provision was repealed eight months after the indictment was returned and 43 days before the defendant's trial). And, interestingly, when this Court discussed these cases, it observed that the "Supreme Court reversed the death sentences of defendants who had gone to trial under statutory schemes that ran afoul of Jackson." People v. Harris, 98 N.Y.2d at 495 (emphasis added). Thus, this Court apparently considered these cases to stand for the proposition that the commencement of trial was the relevant date in determining whether or not a defendant has suffered injury from a Jackson-defective statute.

Second, the defective North Carolina statute contained a fundamental difference from New York's statute that renders these cases inapposite. Significantly, a North Carolina defendant automatically became eligible to receive a death sentence the moment he or she was charged with a capital crime, with no requirement that the prosecutor make an affirmative decision to seek a death sentence. See State v. Spence, 164 S.E.2d 593, 600 (Sup. Ct. N.C. 1968) (Bobbitt, J. concurring in part, dissenting in part).[7] Thereafter, if the defendant tendered a guilty plea to first-degree murder, a separate -- unconstitutional -- statute provided that "the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life" Id. at 601 (quoting G.S. § 15-162.1). As a result, it was at least arguable that a defendant's constitutional rights may have been burdened merely by his being charged with a capital crime under the defective

[7]G.S. § 14-17 provided that a defendant convicted of first-degree murder "shall be punished with death" unless the jury recommended life imprisonment.

statutory scheme. But that argument has no force in New York, where death eligibility is not automatic.

Finally, the Supreme Court's decision to vacate these death sentences in 1971 must be placed in historical context. The Court's decision was made only one year before the Court found that the death penalty, as it was then implemented, violated the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238 (1972). These decisions also pre-dated by seven years the Court's decision in Corbitt v. New Jersey, 439 U.S. 212, 219 (1978), in which it held that a state may permissibly encourage a guilty plea by offering "substantial benefits" to a defendant in return for the plea. In reaching that conclusion, the Court acknowledged that not every burden on a defendant's "exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." Id. at 218-19. Thus, while the Supreme Court has never explicitly overruled Jackson, see Hynes v. Tomei, 92 N.Y.2d at 625, n.5, reliance on 30-year-old caselaw developed in a markedly different legal landscape is of questionable value today. And such reliance becomes even more attenuated when, as explained above, the New York statutes under which defendant was charged and convicted contain significant differences from the statutes under consideration in the Supreme Court's prior cases.

Accordingly, since Mateo, unlike Harris, did not suffer an actual burden on his Fifth and Sixth Amendment rights because he did not proceed to trial under a Jackson-defective statute, his challenge to his death sentence on this ground should be summarily rejected.

Excerpt From the Monroe and Kings County District Attorneys' Application to Stay the Mandate of the Court of Appeals of the State of New York Pending Certiorari in Hynes vs. Tomei and Relin vs. Connell.

Pages 1, 27 to 28

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES,
as District Attorney of
Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the
Supreme Court of the State of
New York, County of Kings, and
MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN,
as District Attorney of
Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the
County Court, Monroe County,
State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General
of the State of New York,

Intervenor.

APPLICATION TO STAY MANDATE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK PENDING CERTIORARI

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

the Court of Appeals, the equities balance in favor of the granting of a stay.[9]

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[9] While state appellate proceedings remain pending in the case of People of the State of New York v. Angel Mateo, the judgment of the Court of Appeals is a final judgment in the civil declaratory judgment actions entitled Matter of Hynes v. Tomei and Matter of Relin v. Connell. Thus, the judgment of the Court of Appeals is subject to review by this Court pursuant to 28 U.S.C. § 1257(a) (1993). See e.g. Harris v. Washington, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971). Moreover, because Mateo has litigated the issue of the constitutionality of New York's capital guilty plea provisions and prevailed, he could not and would not raise this issue again on any direct appeal to the New York appellate courts. Thus, because the People of the State of New York could never otherwise obtain review of the Court of Appeals' judgment, this Court may review the case upon granting a petition for a writ of certiorari. See Pennsylvania v. Ritchie, 480 U.S. 39, 47, 107 S.Ct. 989, 996 (1987); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481, 95 S.Ct. 1029, 1039 (1975) (exception applies where review of a federal issue cannot be had, regardless of the ultimate outcome of the case in which further proceedings are pending).

Moreover, although Michael Shane Hale has pleaded guilty to Murder in the Second Degree and other felonies, the case of Hynes v. Tomei is not moot. The judgment of the Court of Appeals remains in effect and will control all future first degree murder prosecutions in which a notice of intent to seek the death penalty is filed. Thus, the People of the State of New York will never be able to obtain review of the Court of Appeals's determination because it will never again be able to offer or complete a plea to Murder in the First Degree in exchange for a sentence of life imprisonment without parole unless the notice of intent to seek the death penalty is withdrawn. See Democratic Party of United States v. Wisconsin, 450 U.S. 107, 115, 101 S.Ct. 1010, 1015, n. 13 (1981) (case involving Wisconsin system for selecting delegates to Presidential nominating convention not moot because "[t]he effect of the order 'remains and controls future elections'", quoting from Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969). Hence, the underlying dispute between the parties is one "capable of repetition, yet evading review." Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797 (1976); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911). In addition, the plea agreed to by Hale does not prohibit him from subsequently collaterally attacking his plea and/or sentence in either state court or by way of a habeas corpus petition in federal court.

(f) Conclusion

For the foregoing reasons, petitioner requests that an order be entered directing that the mandate of the New York Court of Appeals be recalled and stayed, pending completion of certiorari proceedings before this Court.

Respectfully submitted,

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